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Supreme Court, U.S.
FILED

No. 97-1708

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In The

Supreme Court of the United States

October Term, 1997

Bruce Ryan Nakamura,

Petitioner

v.

Theodore Chun, MD,
The Queen's Medical Center,
Virginia Frelander, RN,
Sandra Proehl, RN

Respondents.

Petition for Writ of Certiorari to the
Hawaii Supreme Court

PETITION FOR WRIT OF CERTIORARI

Bruce Ryan Nakamura
2142-A Mauna Place
Honolulu, HI 96822
(808) 599-4884

27 MP

QUESTION PRESENTED

Should tort defendants be allowed to dismiss with prejudice, a trial scheduled prima facie complaint of injury, for want of inadmissible evidence having no defense probative value?

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THE SUMMARY DISPOSITION ORDER OF THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII ENTERED ON NOVEMBER 20, 1997, AND THE ORDER OF THE HAWAII SUPREME COURT ENTERED ON JANUARY 16, 1998 ARE IN CONFLICT WITH A DECISION BY THE UNITED STATES SUPREME COURT; ALSO ARE IN CONFLICT WITH APPELLATE COURTS OF OTHER DISTRICTS; FURTHER ARE IN CONFLICT WITH THEIR OWN PREVIOUS DECISIONS.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bruce Ryan Nakamura respectfully prays that a writ of certiorari be issued to review the Order of the Hawaii Supreme Court entered into this proceeding on January 16, 1998.

OPINIONS BELOW

A Summary Disposition Order by the Intermediate Court of Appeals of the State of Hawaii was entered on November 20, 1997 affirming the Amended Judgment of the Circuit Court of the First Circuit, State of Hawaii, entered on March 29, 1995, which dismissed with prejudice, petitioner's trial scheduled prima facie medical malpractice complaint, supported by a medical doctor's opinion and the petitioner's medical records, prior to trial for want of inadmissible evidence having no defense probative value.

Petitioner's Motion For Reconsideration of the November 20, 1997 Summary Disposition Order was denied by the Intermediate Court of Appeals of the State of Hawaii and entered on December 9, 1997.

Petitioner's Petition for Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii was denied by the Hawaii Supreme Court and entered on January 16, 1998.

STATEMENT OF JURISDICTION

The United States Supreme Court's jurisdiction to consider civil cases in the courts of appeals is invoked pursuant to 28 U.S.C. §1257 as of January 16, 1998.

STATUTORY PROVISIONS INVOLVED

1st, 7th, and 14th Amendments under the United States Constitution

Title 42 U.S.C. Chapter 21 §§1983, 10801, 10802

STATEMENT OF THE CASE

This is a medical malpractice action. Petitioner Bruce Ryan Nakamura's complaint is that Respondents Theodore Chun, MD, Virginia Frelander, RN, and Sandra Proehl, RN, force medicated and disabled him while he was involuntarily under their care and treatment at The Queen's Medical Center psychiatric ward from May 9 to May 20, 1989 and was unable to leave the locked psychiatric ward to save his health. Petitioner's assertion is that because he was not free to walk away from the adverse circumstances, the respondents exposed themselves to de facto strict liability completely separate from the respondents' issue of discovery of inadmissible evidence. Petitioner also claims that by force medicating and disabling him, the respondents violated his Federal civil rights guaranteed to him by the United States Constitution as stated in Title 42 Chapter 21 of the United States Code, Sections 1983, 10801, and 10802.

Section 1983 headlined Civil action for deprivation of rights, states:

> *"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."*

Section 10801 headlined Congressional findings and statement of purpose, reads: *"(a) The Congress finds that - (1) mentally ill individuals are vulnerable to abuse and serious injury."*

Section 10802 headlined Definitions, reads:

> *"For purposes of this title [42 USCS §§10801 et seq.]: (1) The term 'abuses' means any act or failure to act*

by an employee of a facility rendering care or treatment which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury to a mentally ill individual . . . ."

Petitioner also asserts that by dismissing his prima facie complaint, Circuit Court Judge Wendell K. Huddy, also referred to as Judge Huddy, violated petitioner's 7th Amendment right to trial by jury and that this point was brought before the Intermediate Court of Appeals in petitioner's Reply Brief filed August 24, 1995, and in his Motion for Reconsideration denied on December 9, 1997. Petitioner also asserts that when Judge Huddy dismissed his prima facie complaint for want of inadmissible evidence having no defense probative value, Judge Huddy deprived petitioner of his right to due process guaranteed by the 14th Amendment of the United States Constitution. Petitioner further asserts that his 1st Amendment right to Freedom of Speech protected by the United States Constitution was violated by the respondents. All of these Federal civil rights points, the 1st, 7th, 14th Amendment rights, Title 42 Chapter 21 §§ 1983, 10801, and 10802 rights, were brought to the attention of the Hawaii Supreme Court in petitioner's Petition for Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii, denied and order entered on January 16, 1998.

MAJOR EVENTS IN THIS CASE

A POLICE OFFICER COMMITTED CONTEMPT OF COURT.

On the night of May 8, 1989, petitioner was taken involuntarily to The Queen's Medical Center for psychiatric observation by the police. At the admissions desk petitioner alleges that Officer Gary G. Goeas told him that the handcuffs wouldn't be removed unless petitioner agreed to sign the admission form for so-called "*voluntary*" admission.

Officer Gary G. Goeas, also referred to as Officer Goeas, was supposed to answer questions on November 26, 1994 by way of an oral deposition about his condition of removing petitioner's handcuffs. However, Officer Goeas was absent without leave of court from his deposition and filed no motion to quash subpoena.

On the morning of May 9, 1989, petitioner alleges that Theodore Chun, MD, also referred to as Dr. Chun, loudly, harshly, and sternly told petitioner,

> *"WE CAN DO THINGS THE EASY WAY! YOU CAN VOLUNTEER FOR THE TREATMENT OR I'M GOING TO TAKE YOU TO COURT AND MAKE YOU!!!"*

At his deposition held on January 27, 1994, Dr. Chun said,

> *"I told you at the beginning when I saw you that you could sign into the hospital voluntarily, and that if you did not, that we could go to court and let the judge decide whether you needed to be in the hospital or not."*

Dr. Chun's statement corroborates petitioner's claim that he was threatened with court action into supposedly *"volunteering"* for Dr. Chun's treatment. Petitioner did not want to take medicine because he was worried about permanent adverse side effects. Petitioner tried to refuse medicine but Dr. Chun, Virginia Frelander, RN, and Sandra Proehl, RN, knowingly, recklessly, and intentionally forced him to take medicine, in particular, Haldol. All treatment petitioner received at The Queen's Medical Center from May 9 to May 20, 1989 was under duress of Dr. Chun's threat to take petitioner to court if he didn't supposedly *"volunteer"* for Dr. Chun's treatment.

In the end, petitioner's worries about medication damage came true. Today at age 45, he is disabled with constant fatigue, developed senile (old age type) cataracts at age 43, and since May 1989, sleep is no longer easy, restful, or

restorative. There is no known history of anyone in petitioner's biological family developing cataracts until after attaining the age of 65+ years.

A JUDGE APPROVED OF A WITNESS COMMITTING CONTEMPT OF COURT.

In the course of prosecuting his medical malpractice complaint, Petitioner brought up his understanding that the Honolulu Sears, Roebuck, and Company store, also referred to as Sears, made a security videotape of him and covertly distributed his picture from the videotape through security channels around town with libelous documentation indicating that the petitioner was to be considered an undesirable person to have on the premises. The result was a series of attempts by University of Hawaii library security employees to drive petitioner out of the building. The personnel manager of that Honolulu Sears store, Stanley Nako, was subpoenaed by petitioner to come to an oral deposition to answer questions about this matter. Stanley Nako and Sears, did not call or write petitioner, failed to appear for the deposition, and did not file a motion to squash subpoena. Subsequently, petitioner filed a motion to compel Mr. Nako to come to an oral deposition. Neither Mr. Nako nor anyone on behalf of Sears showed up for the motion to compel hearing. No papers were filed in opposition to the motion to compel hearing. Sears and Mr. Nako completely ignored petitioner's motion to compel papers as there were no phone calls or letters from Mr. Nako or Sears regarding this hearing. Circuit Court Judge Wilfred K. Watanabe, also referred to as Judge Watanabe, denied petitioner's motion to compel without explanation, even though Judge Watanabe was bound by Hawaii Revised Statute 602-11 to abide by Rule 37 of the Hawaii Rules of Civil Procedure titled: "Failure to make discovery: Sanctions." This outcome struck petitioner as shockingly wrong.

Hawaii Revised Statute 602-11 reads:

> "**Rules.** The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law."

Rule 1 of the Hawaii Rules of Civil Procedure reads:

> "**SCOPE OF RULES.** These rules govern the procedure in the circuit courts of the State in all suits of a civil nature whether cognizable as cases at law or in equity . . . ."

During the discovery proceedings petitioner introduced as prima facie evidence two audio tapes. One audio tape spoke about the aforementioned security video tape of the petitioner recorded by the Honolulu Sears branch. The other audio tape stated that an agency of the government was involved in petitioner's life. On both of these audio tapes, nothing was said about medical malpractice or force medication, and no respondent was named or even implied. Petitioner declined to name the voices on the audio tapes because he was worried that the identity protected voices might get anonymous threatening telephone calls. The identity protected voices were not physical witnesses to petitioner's treatment by the respondents, nor are they medical doctors.

On May 20, 1994 Judge Melvin K. Soong also referred to as Judge Soong heard the motion of the respondents filed May 4, 1994 to compel petitioner to answer interrogatories about the audio tapes, in particular the identities of the voices. Judge Soong questioned William A. Bordner, the lawyer arguing for respondent The Queen's Medical Center as follows:

> *"The Court: And so I don't know, Mr. Bordner, from that standpoint, whether all that you allege on the failure of the plaintiff to respond to these interrogatories are so all-encompassing so that you are unable to prepare for your defense.*

Mr. Bordner: I understand what the Court's concern is. I'd be happy to submit another motion explaining the context of these particular interrogatories so that it's clear that lesser sanctions would not be sufficient to ameliorate the problem created by Mr. Nakamura's refusal to obey Court orders. If the Court would like that explained in more detail, I will do that.

The Court: Why? Because I don't know whether the failure to respond to these interrogatories is such that, again, it prevents the defendants from preparing for this case."

It can be seen that Judge Soong strongly doubted the need of the respondents for the names of the identity protected voices to prepare their defense.

As the result of this May 20, 1994 hearing, Judge Soong declared the audio tapes inadmissible and sanctioned petitioner $500.00 which was timely paid, for protecting the voices from possible threats by not naming them. As petitioner continued to prosecute his case, petitioner agreed not to use the audio tapes at further depositions to satisfy the respondents, but his trial scheduled prima facie case of medical malpractice was dismissed with prejudice by Judge Wendell K. Huddy because petitioner declined to name the identity protected voices to shield them from possible threats despite failure of the respondents to show how the audio tapes had defense probative value regarding medical malpractice. If either of these audio tapes spoke of medical malpractice or force medication, or identified or implied knowledge of any of the respondents, petitioner would have identified the voices.

REASONS FOR GRANTING THE WRIT

ALLOWING TORT DEFENDANTS TO DISMISS A PRIMA FACIE COMPLAINT FOR WANT OF INADMISSIBLE EVIDENCE HAVING NO DEFENSE PROBATIVE VALUE IS CLEARLY AGAINST REASON AND DAMAGES SOCIETY'S RESPECT FOR THE JUDICIAL SYSTEM.

The confidence of the citizenry in the judicial system, and the ability of the judicial system to elicit the voluntary compliance of the populace with the laws of the country, are predicated upon the belief of the people that the judicial system is equitable, just, and fair.

THIS IS A PRIMA FACIE CASE OF MEDICAL MALPRACTICE.

In his Discharge Summary dictated May 20, 1989, Dr. Chun wrote: *"**The patient** lacked insight and **initially refused medication.** He **grudgingly** took his medication after some **persuasion**."* The **persuasion** is Dr. Chun's threat to take petitioner to court if petitioner didn't supposedly "*volunteer*" for Dr. Chun's treatment. *"Because of his **resistance to taking medication, it was decided to start the patient on Haldol Decanuate** . . . . Although he was **resistive** . . . **[O]n a daily basis the patient would ask for discharge** . . . ."* (Bold emphasis by petitioner)

THEODORE CHUN, MD COMMITTED DE FACTO KIDNAPPING.

The longest Dr. Chun could have lawfully held petitioner against his will inside The Queen's Medical Center was 48 hours. Yet despite being asked by petitioner "*on a daily basis*" to be released, **Dr. Chun refused to release petitioner and thereby committed de facto kidnapping.**

Dr. Chun further dictated:

"He also continued to ask that his medication be cut in half and even went to the point of refusing to take a whole tablet of the Haldol and Cogentin and had the nurse give him half a tablet before he would take it. Because of this, it was decided to give him another cubic centimeter of Haldol Decanuate on 05/18/89 . . . ." (Bold emphasis by petitioner)

Petitioner's medical doctor expert Dr. Richard Rappaport opined:

"In regard to the patient's being given the medication, Haldol, without his permission and despite the fact that he refused the medication, the following remarks must be made: ***The law in Hawaii states that a patient has the right to refuse treatment even if he is a voluntary patient in a hospital.*** (bold emphasis by petitioner) *Bruce Nakamura felt that he was forced to accept hospitalization and medication that he did not want even though it may have been appropriate for him. But, since he had the right to refuse, he should have been treated with respect for those rights and not threatened or treated with force unless he was considered dangerous. If the patient was dangerous, then forced admission and forced treatment are appropriate in the form of restraints and IM [intramuscular] medication, but only on an emergency basis. If the patient continues to refuse treatment, the patient should be examined to determine his competency to exercise his right of refusal, or should be entered into the legal process of obtaining a waiver of that right so that the doctor can then treat the patient. If the doctor does not want to proceed through these alternatives, he should discharge the patient, AMA (against medical advice). However, whatever method he chooses to deal with the reluctant patient, he must record all the events*

with an explanation as to his thinking in making the various choices. All of this is especially important and essential in dealing with a delusional disordered patient even if the medication is appropriate, because such patients are by the nature of their illness, suspicious and do not see themselves as ill.

The correct procedure was not observed by the medical staff in that the proper forms were not filled out, notations not properly made in the records and the thinking of the staff was not documented as to why the patient was given the medication without his non-threatened agreement. There are, in fact, some statements in the medical records, including the discharge summary, which indicate that the patient refused medication. However, the only compliance by the staff with that refusal was to give the patient, at one point, a half a dosage. (Bold emphasis by petitioner) *Otherwise there is no indication as to why the staff went ahead and gave the patient oral medication, as well as IM medication on two occasions."*

Respondents never hired an expert to rebut Dr. Richard Rappaport's opinion. Dr. Chun's Discharge Summary and Dr. Rappaport's opinion established a prima facie case of medical malpractice.

THE ORDERS BY THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII AND THE HAWAII SUPREME COURT CONFLICT WITH THE UNITED STATES SUPREME COURT.

The Summary Disposition Order entered November 20, 1997 by the Intermediate Court of Appeals of the State of Hawaii, and the denial by the Hawaii Supreme Court of petitioner's Petition for Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii, entered on January

16, 1998 are directly contrary to the decision of The United States Supreme Court which opined that "[A] *person's right to his day in court is basic to our very system of jurisprudence." In re Oliver,* 333 U.S. 257, 68 S. Ct. 499, 92 L.Ed. 682 (1948).

THE SUMMARY DISPOSITION ORDER OF THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII CONFLICTS WITH ITS OWN DECISIONS.

In *Mendes, Sr. v. Hawaii Insurance Guaranty Association,* Haw. App. Slip Op. #19932 (February 11, 1998) the Intermediate Court of Appeals of the State of Hawaii opined that:

> *"Where the unambiguous language of the statute mandates a particular result, we are bound to follow it. For the above reasons, we vacate in part the circuit court's judgment dismissing count I of Mendes' complaint and remand for further proceedings."*

THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII FAILED TO ABIDE BY THE UNAMBIGUOUS LANGUAGE OF THE STATUTE.

Hawaii Revised Statute 626-1 reads: "**Enactment.** The Hawaii Rules of Evidence as set forth in this section is enacted."

Rule 101 of the Hawaii Rules of Evidence reads: "**Scope.** These rules govern proceedings in the courts of the State of Hawaii . . . ."

The Intermediate Court of Appeals of the State of Hawaii was bound by law to evaluate the probative need of the respondents to know the names of the identity protected voices in accordance with Hawaii Rules of Evidence 401, and 402, defining relevance, and 403-2A (1) & (2) defining the meaning of probative value.

Rule 401 from the Hawaii Rules of Evidence Manual reads:

> "Definition of 'relevant evidence.' 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The last sentence of Rule 402 reads: "Evidence which is not relevant is not admissible." Judge Soong ruled that the audio tapes were inadmissible. Logically then, it can be understood that the audio tapes are irrelevant to the medical malpractice action. Please recall that Judge Soong expressed strong skepticism that the respondents needed answers to their interrogatories about the audio tapes to prepare their defense.

Rule 403-2A (1) of the Hawaii Rules of Evidence Manual reads:

> "*Meaning of 'probative value.'* On the admissibility side of the balance, 'probative value' is a compound concept, comprising the degree of relevance to prove one or more disputed facts plus the element of need."

Rule 403-2A (2) reads:

> *"Probative value includes need.* Probative value is a function not only of relevancy, but also of need for the evidence. Need assessment has perhaps three elements: (a) the centrality or relative importance of the fact to be inferred in the overall context of the lawsuit; (b) the degree to which the fact to be inferred is actually disputed; and (c) the availability and quality of other evidence tending to prove the same point."

Judge Wendell K. Huddy's dismissal with prejudice decision was so totally devoid of evidentiary or logical

support showing how the audio tapes have defense probative value regarding medical malpractice so as to render Judge Huddy's decision unconstitutional under the due process clause of the 14th Amendment. The Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court failed to evaluate the compatibility of Judge Huddy's order dismissing petitioner's prima facie complaint with prejudice, in accordance with the definition of probative value as defined by the Hawaii Rules of Evidence 401, 402, 403-2A (1) and (2) as the courts were bound by Hawaii Revised Statute 626-1 to do, and thus the failures to so evaluate, were plain errors violating petitioner's Federal civil rights. There is no way the Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court can show that their orders were based upon a construction applying Hawaii Rules of Evidence 401, 402, and 403-2A (1) & (2) that both courts were bound to abide by as required by Hawaii Revised Statute 626-1. Petitioner pointed out to the Intermediate Court of Appeals of the State of Hawaii that the voices on the audio tapes were not physical witnesses to what happened at The Queen's Medical Center and are not medical doctors, so the voices CANNOT offer even a lay opinion as to Dr. Chun's diagnosis of delusions or whether force medication took place.

In *Azer v. The Courthouse Racquetball Corp., 9 Haw. App. 530, 539, 540, 852 P.2d. 75, 77* (1993) The Intermediate Court of Appeals of the State of Hawaii opined:

> *"A trial court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.*
>
> *Dismissal of a pending action by the trial court with prejudice is not favored. A full trial on the merits is favored."*

Petitioner contends that Judge Huddy's dismissal of a prima facie case of medical malpractice with prejudice for want of inadmissible evidence having no defense probative

value is abuse of discretion. When an objective person considers the whole picture of petitioner's goal of protecting the unnamed audio tape voices from getting possible threats; his timely paying a $500.00 sanction for protecting the voices; given that Judge Soong declared inadmissible the audio tapes which do not speak of medical malpractice or force medication or name any of the respondents; given that Judge Soong clearly doubted that the respondents would be hampered in their defense because they did not have the audio tape information that they wanted; given that petitioner agreed not to use the inadmissible audio tapes at future depositions; and given petitioner's active prosecution of his complaint; that petitioner did not name the identity protected voices, cannot be contextually judged contumacious conduct deserving of dismissal with prejudice.

The failures of the Intermediate Court of Appeals of the State of Hawaii and Hawaii Supreme Court to recognize that Judge Huddy's dismissal with prejudice decision as abuse of discretion were plain errors that failed to protect petitioner's Federal civil rights.

CONFLICT WITH A HAWAII SUPREME COURT DECISION

In *Lim v. Harvis Construction, Inc.*, 647 P.2d 290 (1982) the Hawaii Supreme Court opined:

> *"Where it is not shown that the plaintiff was guilty of deliberate delay or contumacious conduct nor that the defendants were actually prejudiced by a delay in bringing the case to trial, dismissal of the complaint is too harsh a sanction to be applied."*

On August 25, 1993, Judge Wilfred K. Watanabe heard petitioner's Motion For An Order To Compel Queen's Medical Center To Comply With Plaintiff's First Request For Production Of Documents filed August 6, 1993. Lawyer J. Gerard Lam on behalf of The Queen's Medical Center wrote in his opposition memorandum,

"Insofar as Plaintiff's request relates to records regarding Dr. Chun, no such records exist since Dr. Chun was not an employee of QMC -- a fact well-known to Plaintiff."

Judge Watanabe did not agree and ordered The Queen's Medical Center to forward to petitioner documents in its possession about Dr. Chun. Subsequently, 163 pages about Dr. Chun that The Queen's Medical Center falsely said did not exist were produced by the hospital. However petitioner was still of the opinion that documents were missing because examination of the papers from the files of the petitioner, Theodore Chun, MD, Virginia Frelander, RN, and Sandra Proehl, RN, revealed no indication that a complaint against any of the respondents alleging force medication had been made or that a lawsuit had been filed.

On September 17, 1993 a discovery conference was held in the chambers of Circuit Court Judge Melvin K. Soong. Petitioner repeatedly brought up the topic of missing hospital documents, but Judge Soong failed to question the hospital's lawyer about this subject. Despite petitioner repeatedly asking Judge Soong during the discovery conference about documents missing from the papers turned over to petitioner by The Queen's Medical Center, Judge Soong played deaf and never answered petitioner's repeated questions about missing documents. The discovery conference was a waste of time, nothing came of it.

Thereafter, petitioner's expert Dr. Richard Rappaport wrote an opinion dated July 25, 1994 as follows:

"Dear Mr. Nakamura:

It is my opinion that a patient's hospital records, or a file on a patient at that hospital, should contain copies of complaints made against that hospital should such exist. Litigation in particular should cause a record to be created and that record should be a part of the patient's record or file.

The records you sent to me on your case, against Quinn (sic) Medical Center, did not show that your complaint or suit had been filed. The absence of such, had it been sent and received by the hospital, indicates an omission (negligence) or a washing of the records (an illegal act) and both are below the standard of care for a hospital psychiatric department."

Dr. Rapapport's July 25, 1994 letter was submitted to Judge Huddy, in petitioner's Motion For An Index Of All Documents In The Possession Of The Queen's Medical Center filed on August 22, 1994 and heard by Judge Huddy on October 19, 1994. During this hearing, Judge Huddy did not ask The Queen's Medical Center to explain away Dr. Rappaport's opinion that documents were missing. In the end, Judge Huddy ordered The Queen's Medical Center to make an index for his eyes only, which indicated that he had his questions about the documentation inventory, and denied petitioner's motion for an index. After serving The Queen's Medical Center with FOUR requests for production of documents, there can only be one reason why documents are missing, and that is that those missing documents tend to show that the respondents committed medical malpractice and so were withheld from petitioner, which would be contumacious conduct and contempt of court; or destroyed which would be illegal and contempt of court; or were never created, which would be conduct below the standard of care. Certainly those missing documents do not prove the innocence of the respondents. Again, the Queen's Medical Center is either negligent in failing to create the documents that Dr. Rappaport opined were missing, or washed the records which is an illegal act, or guilty of evasive contumacious delaying contempt of court conduct by withholding documents that are directly related to petitioner's complaint and have prima facie admissibility; as compared to the inadmissible audio tapes which do not speak of force medication or medical malpractice or name or imply knowledge of any of the respondents. The failure by

the Hawaii Supreme Court to recognize that Judge Huddy's dismissal with prejudice decision was too harsh and in conflict with its decision in *Lim v. Harvis Construction Inc.*, was plain error which failed to protect petitioner's Federal civil rights.

CONFLICT WITH OTHER APPELLATE COURTS

The Court of Appeals of Michigan ruled in *Houston v. Southwest Detroit Hospital*, 420 N.W.2d 835, 836 (Mich.App. 1987) *"[T]hat trial court could only dismiss with prejudice after evaluating all options on record and concluding what option was justice and proper."* On page 838 the Court of Appeals of Michigan quoted from *Higgins v. Henry Ford Hospital, 384 Mich. 633, 637, 186 N.W.2d 337 (1971).*

> " 'Rules of practice and procedure are exactly that. They should create no rights and should be thought of as indicating the way in which justice should be administered. They should give direction to the process of administering justice *but their application should not become a fetish to the extent that justice in an individual case is not done.* There is a need for guides and standards. They must be followed but they must always be thought of as *guides and standards to the means of achieving justice, not the end of justice itself.' "* (Emphasis in original)

Also on October 19, 1994 the respondents' motion for dismissal was heard by Judge Wendell K. Huddy. Since the audio tapes were already ruled inadmissible by Judge Soong on May 20, 1994, further inquiry about the names of the identity protected voices was moot. Again, please recall that Judge Soong doubted that the respondents needed answers to their audio tape interrogatories to prepare their defense. Judge Huddy and the respondents NEVER asked petitioner about whether the identify protected voices were physical witnesses to petitioner's treatment at The Queen's

Medical Center and NEVER asked if the identity protected voices are medical doctors. Instead, during the October 19, 1994 hearing, Judge Huddy shocked petitioner by conducting discovery on behalf of the respondents by asking petitioner during the hearing if he had other audio tapes, a question that the respondents never asked, which indicated that Judge Huddy had a fetish about possible additional audio tapes. Judge Huddy did not conduct the hearing in an equitable manner.

In *Beck v. Wings Field Inc. C.C.A.Pa., 122 F.2d 114 (1941)* the court opined that abuse of discretion was *"A discretion exercised to an end or purposes not justified by and clearly against reason and evidence."* Judge Huddy's dismissal of petitioner's complaint was abuse of discretion because his decision, not based upon defense probative value, was clearly against reason and evidence to the manifest detriment of the petitioner's Federal civil rights.

The Court of Civil Appeals of Texas, Houston (Fourteenth District) ruled in *Phillips v. Vinson Supply Company,* 581 S.W.2d 789, (1979) that *"[D]ismissal of an action for failure to comply with discovery order is without prejudice."* Judge Wendell K. Huddy dismissed petitioner's complaint with prejudice for want of inadmissible evidence having no defense probative value. Petitioner reasoned in his papers to Judge Huddy that whether the audio tapes are true or incorrect, force medication still could have occurred, hence there was no defense probative value. Judge Huddy's dismissal with prejudice order constituted abuse of discretion because his dismissal with prejudice order was clearly against reason to the manifest detriment of the petitioner's Federal civil rights.

The Court of Appeals of Texas, Amarillo ruled in *Moore v. Armour & Company, Inc.,* 660 S.W.2d 577, (Tex. App. 7 Dist. 1983) that:

> *"Where plaintiff had announced ready, secured a trial setting and stood ready to go to trial when his case was dismissed, dismissal of his personal injury suit was an abuse of discretion."*

Petitioner had basically completed his discovery, secured a trial setting, and was 80% prepared for trial. The bulk of petitioner's remaining work consisted of making exhibits. Both the Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court denied petitioner his Federal right to trial by jury guaranteed by the 7th Amendment of the United States Constitution.

In *State v. Meiers*, *412 S.W.2d 478* (1967) the Supreme Court of Missouri opined that:

> *"[P]lain errors affecting substantial rights may be considered on motion for new trial or on appeal though not raised in trial court if manifest injustice or miscarriage of justice has resulted . . . ."*

In the contextual view of Dr. Chun committing de facto kidnapping and Dr. Rappaport's opinion that Haldol was administered to petitioner without petitioner's permission, this instant case is a prima facie complaint of medical malpractice TANTAMOUNT TO A CRIME. The failures by the Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court to defend petitioner's 1st, 7th, and 14th Amendment rights in addition to his Title 42 Federal rights are plain errors that caused petitioner to suffer manifest injustice.

CONCLUSION

The Summary Disposition Order of the Intermediate Court of Appeals of the State of Hawaii entered on November 20, 1997 affirming Judge Huddy's dismissal with prejudice order entered on March 29, 1995, and the Hawaii Supreme Court's order denying certiorari to the Intermediate Court of Appeals of the State of Hawaii entered on January 16, 1998, do not have the construction to withhold review by the United States Supreme Court because the Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court cannot show that the affirmation of Judge

Huddy's dismissal with prejudice order simultaneously affirmed petitioner's Federal civil rights guaranteed by the 1st, 7th, and 14th Amendments of the United States Constitution, as well as Title 42 Chapter 21 §§ 1983, 10801, and 10802, of the U.S. Code. Both the Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court completely ignored petitioner's Federal civil rights points raised in his Reply Brief filed August 25, 1994, Motion For Reconsideration denied December 9, 1997, and Petition for Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii, denied January 16, 1998.

There is also no evidence that the petitioner got the protection of Hawaii law in which his appeal was actually evaluated in accordance with the Hawaii Rules of Evidence, especially regarding the definition of probative value, as mandated by Hawaii Revised Statute 626-1.

In addition there were several plain errors including one decision approving of contempt of court by Stanley Nako without explanation, and the condoning by Judges Soong and Huddy of respondent The Queen's Medical Center either withholding documents in contumacious contempt of court, or negligently failing to create records that Dr. Rappaport opined were missing, or illegally washing the records, such that an objective person could only come to the following conclusions: (1) The decisions by the Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court were in conflict with rulings by the United States Supreme Court, with a February 1998 decision by the Intermediate Court of Appeals of the State of Hawaii, a decision by the Hawaii Supreme Court, and other appellate courts. (2) The way petitioner's complaint was handled in the Circuit Court of the State of Hawaii, the Intermediate Court of Appeals of the State of Hawaii, and the Hawaii Supreme Court, was a series of abuses of discretion and/or plain errors blatantly and manifestly detrimental to the petitioner. (3) There is no evidence that the Intermediate Court of Appeals of the State of Hawaii or the Hawaii Supreme Court considered and protected petitioner's Federal civil rights guaranteed to him by the 1st, 7th, and

14th Amendments of the United States Constitution, and by Title 42 Chapter 21 §§ 1983, 10801, and 10802 of the U.S. Code. (4) Dr. Chun committed de facto kidnapping when he refused to release petitioner after 48 hours, despite petitioner asking on a daily basis to be discharged. (5) Based upon Dr. Chun's Discharge Summary and Dr. Rappaport's opinion, there is probable cause to believe that the way respondents treated petitioner was TANTAMOUNT TO A CRIME. (6) The justices of the Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court failed to evaluate petitioner's appeal in accordance with the Hawaii Rules of Evidence that the courts are bound by Hawaii Revised Statute 626-1 to follow, and that this failure torpedoed a meritorious prima facie complaint of medical malpractice that was TANTAMOUNT TO A CRIME. (7) Tort defendants can dismiss a prima facie complaint with prejudice for want of inadmissible evidence having no defense probative value. (8) Petitioner suffered a miscarriage of justice when his prima facie complaint of medical malpractice TANTAMOUNT TO A CRIME was dismissed with prejudice for want of inadmissible evidence having no defense probative value.

The Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court need guidance from the United States Supreme Court as to what is justifiable dismissal that does not conflict with the decisions of the United States Supreme Court, other appellate courts, and with the decisions of the Intermediate Court of Appeals of the State of Hawaii as well as the Hawaii Supreme Court themselves, while simultaneously protecting and affirming the Federal civil rights of the people.

The Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court also need admonition to abide with Hawaii Revised Statute 626-1 mandating court compliance with the Hawaii Rules of Evidence. The Intermediate Court of Appeals of the State of Hawaii and the Hawaii Supreme Court further need a reminder that citizens of the State of Hawaii are also citizens of the overall Federal republic with Federal civil rights guaranteed to them by the

United States Constitution and Title 42 Chapter 21 §§ 1983, 10801, and 10802 of the U.S. Code.

It denigrates the reputation and integrity of the entire judicial system, both at the national and state level, to allow tort defendants to dismiss a prima facie complaint of injury tantamount to a crime, for want of inadmissible evidence having no defense probative value. Therefore it is respectfully requested that this Petition for Writ of Certiorari to the Hawaii Supreme Court be granted, or in the alternative, summary reversal orders be issued: (1) vacating the Order entered by the Hawaii Supreme Court on January 16, 1998; (2) vacating the Summary Disposition Order entered by the Intermediate Court of Appeals of the State of Hawaii on November 20, 1997; and (3) ordering petitioner's case remanded back to the Circuit Court of the State of Hawaii for trial scheduling.

Respectfully submitted,

Bruce Ryan Nakamura
2142-A Mauna Place
Honolulu, HI 96822
(808) 599-4884